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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-338

ROBERT CARROLL and WESTERN SURETY COMPANY,
Petitioners,

v.

STEVEN RAY McDANIEL, b/n/f and natural parent, KEITH McDANIEL; BENNY FRED JENKINS, and CONSTANCE BEVERLY HARBISON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Robert Carroll, who is the Sheriff of Blount County, Tennessee, and Western Surety Company, a corporation, which is his bonding company, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered April 11, 1972, in this cause.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 457 F.2d 968, and is incorporated verbatim herein as Appendix A. There was an opinion

written by the District Court on motion for new trial which opinion is unpublished but is likewise printed in Appendix C. The order denying the petition for rehearing is also printed in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 11, 1972. A timely petition for rehearing en banc was denied on May 30, 1972, and this petition for ceritorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit Court of Appeals' decision holding a Sheriff, who stands in the position of a principal, vicariously liable for *punitive* damages of his agent-deputy, is in conflict with applicable decision of this Court and other U. S. Courts of Appeal?

2. Whether the Sixth Circuit Court of Appeals Decision holding a Sheriff, who stands in the position of a principal, vicariously liable for punitive damages of his agent-deputy, is in conflict with Amendment 7, 8 and 14 of the United States Constitution?

3. Whether the holding of the Court below that a Sheriff is liable vicariously for punitive damages for the act of his deputy, even though he did not participate in, authorize or ratify said act, is in conflict with applicable Tennessee Law?

4. Whether the Court below's approval of the District Court's action in entering a verdict assessing to the Sheriff the jury's judgment for punitive damages given against the deputy is in conflict with the verdict of the jury, is

consistent with due process of law and is in conflict with decisions of this Court and other Federal Courts?

STATUTES AND RULES INVOLVED

The statutory provisions involved are 42 United States Code 1983, 1985, 1988. The foregoing statutes are printed in Appendix E, *infra*.

STATEMENT OF THE CASE

These actions were filed against a deputy, the sheriff, and their bonding company, seeking to recover damages for violation of Civil Rights under Title 42 USC 1983 as a result of an incident on the evening of October 24, 1970. The jury apparently found that defendant Deputy Latham exercised unreasonable force when he fired his gun wounding plaintiffs herein. Defendant Sheriff Carroll was not present during the incident and did not direct or participate with regard to same. The incident occurred in a City (Alcoa, Tennessee) and the overall supervision of the proceedings was in the hands of Alcoa City officers and not the Sheriff Department. There was no proof introduced which tended to show that Sheriff Carroll was negligent in the selection, training, or retaining of his deputy or that he expressly or impliedly authorized the wrongful act. The District Judge, however, charged the jury that the Sheriff and bonding company were liable for the acts of the deputy under the "doctrine of agency" and further charged the jury that they might, if they believed them merited, award punitive damages if they believed the deputy wilfully and wantonly deprived plaintiffs of their constitutional and federal statutory rights. On May 11, 1971, judgments were reported by the jury simply as "for the plaintiff" and not against any defendant in the following amounts: Benny Fred Jenkins compensatory

damages $3,000.00 and punitive damages $30,000.00; Steven Ray McDaniel, compensatory damages $500.00 and punitive damages $3,500.00; Constance Beverly Harbison, compensatory damages in the sum of $500.00 and punitive damages of $3,500.00. The Court entered the judgments as to punitive damages against the deputy *and against the sheriff and the bonding company*. The District Judge did not allow the question of punitive damages as to the sheriff to be submitted to the jury. The sheriff and the bonding company filed a timely motion for new trial which was overruled by the District Judge. They then appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the lower Court's actions.

REASONS FOR GRANTING WRIT

I

THE DECISION OF THE COURT OF APPEALS HOLDING A SHERIFF, WHO STANDS IN THE POSITION OF A PRINCIPAL, VICARIOUSLY LIABLE FOR PUNITIVE DAMAGES OF HIS AGENT-DEPUTY, WHEN THE SHERIFF HAS NOT PARTICIPATED IN, AUTHORIZED OR RATIFIED THE ACT WHICH MERITS THE PUNITIVE DAMAGES, IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER U. S. COURTS OF APPEAL.

In civil rights actions filed under Section 42 U.S.C. 1983, et seq., Federal law shall control with regard to the amount of damages recoverable if there is a stated Federal common law. In *Basista v. Weir*, 340 F.2d 74 (Third Cir. 1965), the Court was faced directly with the question of what type damages could be awarded under the Civil Rights Act. Just as in the present case, an action was brought under the Civil Rights Acts against a chief of

police, captain of police, and patrolman alleging an assault and battery was committed upon the plaintiff and he was denied his rights while taken to jail. The Court stated that Section 1983, Title 42 U.S.C. is "completely silent as to the kind of damages which may be awarded an injured plaintiff in a civil rights suit such as that at bar". The Court goes on to say that they should look at 42 U.S.C. 1988:

"Section 1988 has not been construed by any court insofar as we have been able to ascertain in respect to the identical issue that we have before us. The mandate the statute imposes seems clear, however, without judicial interpretation. It provides that the laws of the United States shall be employed in vindicating civil rights in civil suits insofar as they are suitable to the subject but where those laws 'are not adapted to the object, or are deficient,' then the law of the State wherein the Court of the United States sits shall be applied to supply the deficiency, so far as the constitution and statutes of the State are not inconsistent with the Constitution and laws of the United States.

"The Civil Rights Act were brought into being at a critical time in the history of the United States following the Civil War. They were intended to confer equality in civil rights before the law in all respects for all persons embraced within their provisions. We believe that the benefits of the Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. Federal common law must be applied to effect uniformity, other-

wise the Civil Rights Act would fail to effect the purposes and ends which Congress intended.

* * *

"We are of the opinion, as we have stated, that the federal common law of damages commands the issue of damages in the case at bar."

340 F.2d 74 (1965) at Pages 86-87.

In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969), this Court, speaking through Mr. Justice Douglas, held:

"Compensatory damages for deprivation of a federal right are governed by Federal standards, as provided by Congress in 42 USCA Sec. 1988, which states:

"'The jurisdiction in civil . . . matters conferred on the District Courts by the provision of this chapter and Title XVIII for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the state wherein the Court having jurisdiction of such civil or criminal cases held, so far as same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said Courts in the trial and disposition of the cause . . .' This means, as we read Section 1988, that both Federal and State rules on damages may be utilized, whichever best serve the policies expressed

in the Federal Statutes. C. F. Brazier v. Cherry, 5 CIR 293 F.2d 401. *The rule of damages, whether drawn from Federal or State sources, is a Federal Rule responsive to the need whenever a Federal right is impaired.* We do not explore the problem further, as the issue of damages was not litigated below.'" (Emphasis added.)

90 S. Ct. at Page 406.

The Court is further directed to *Lee v. Southern Homesites Corp.*, 429 F.2d 290, CA Miss. 1970, and, *Caperci v. Huntoon*, 397 F.2d 801 (1968), certiorari denied, 89 S. Ct. 299, 393 U.S. 940, 21 L. Ed. 2d 276.

Probably the most authoritative and latest work with regard to civil rights actions was written by Chester J. Antieau, Lawyers Co-op. copyright 1971, entitled *Federal Civil Rights Acts*. Under Sec. 76 he states as follows:

"*The amount of actual damages is, in the interest of national uniformity, governed by Federal common law.* The Third Circuit Court of Appeals explains:

"'We believe that the benefits of the (Civil Rights) Acts were intended to be uniform throughout the United States, that the protection to the individual afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended.'" (Emphasis added.)

The question then arises as to whether or not there is a Federal rule which has been developed by the Federal Courts to be applied in this case which rule would better serve the policies expressed in the Federal Statutes. It appears that the law with regard to vicarious liability for punitive damages was established in *Lake Shore & M. S. Railway Co. v. Prentice*, (1893) 147 U.S. 101, 37 L. Ed. 97, 13 S. Ct. 261. Although this is an 1893 case, it has been Shephardized and we find the case has been cited many, many times throughout the years. It does not appear to have been ever overruled and has been cited quite recently.

In *Lake Shore*, *supra*, the plaintiff was embarrassed and caused to be arrested by a conductor on a train. Mr. Justice Gray speaking for the Court stated:

> "The single question presented for our decision therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains toward a passenger.
>
> "This question, like others affects the liability of a railroad corporation as a common carrier of goods or passengers,—such as its right to contract for exemption from responsibility for his own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment—is a question, not of local law, but of general jurisprudence, upon which this Court, in the absence of express statute regulating the subject, will exercise its own judgment uncontrolled by the decisions of the Courts in several states. Railroad Company v. Lockwood, 17 Wall. 357, 368; Liverpool & G. W. Steam Co. v. Phoenix Ins. Co., 129 U.S. 397, 443, 9 S. Ct.

Rep. 469; Myrick v. Railroad Co., 107 U.S. 102, 109, 1 S. Ct. Rep. 425; Hough v. Railway Co., 100 U.S. 213, 236."

13 S. Ct. 261 at 262 (*Lake Shore*)

The Court noted that there was a wide divergence of opinion among State Courts on this question and indicated that it would in this opinion resolve the Federal law on this a Federal question. The Court held:

"Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment to the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent . . ."

At Page 263

The Court goes on to say:

"In Keene v. Lizardi, 8 La. 26, 33, Judge Martin said:

"'It is true, juries sometimes very properly give what is called "smart money". They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct; but this is only justifiable in an action against the wrongdoer, and not against person, who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent.' To the same affect are (many cases cited).

"The Court further stated:

> "'The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this Court, and opposed to the preponderance of well considered precedents.'"

Lake Shore, supra, has been cited with approval and followed as late as 1969, by the United States Court of Appeals for the Sixth Circuit in *United States Steel Corp. v. Fuhrman*, (1969) 407 F.2d 1143. That case was heard before Weick, Chief Judge, and Phillips and Peck, Circuit Judges, and involved the decision of a ship's master to beach the vessel in heavy fog. Punitive damages were assessed against the ship owner and this Court reversed, holding:

> "We think the better rule is that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident. Punitive damages also may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him. Lake Shore & Michigan Southern Railway v. Prentice, 147 U.S. (3 Wheat.) 546, 556-557, 4 L. Ed. 456; Pacific Packing & Navigation Co. v. Fielding, 136 F. 577 (9th CIR)."
>
> 407 F.2d 1143 at 1148.

In *General Motors Acceptance Corp. v. Froelich*, U.S. Ct. App., Dist. of Columbia, CIR (1959), 273 F.2d 92, it was stated:

"As to the sufficiency of the evidence to take the case to the jury on the issue of punitive damages, the liability of a corporation for such damages, with its limitations, was settled in the leading case of Lake Shore & Michigan Southern Railway v. Prentice, 147 U.S. 101, 13 S. Ct. 261, 37 L. Ed. 97, and has been upheld in this jurisdiction in cases somewhat comparable to the present one in Wardman Justice Motors Inc. v. Petrie, 59 App. D.C. 262, 39 F.2d 512, 69 ALR 648, and by our Municipal Court of Appeals, in Jackson v. General Motors Acceptance Corp., D.C. Mun. App. 140 Atlantic Second 699. See F. Columbia Finance Corp. v. Worthy, D.C. Mun. App. 141 A. Sec. 185 . . . 'To hold a corporation liable (for exemplary damages), it must appear that the trespass was committed by a servant acting within the scope of his employment, and the servant's act was either authorized or ratified by officers of the corporation having authority to speak for it' . . ."

273 F.2d 92 at Page 94.

The Court goes on to hold that it is a *jury question* as to whether or not there was such participation in the wanton and reckless invasion of plaintiff's rights by the defendant through its agents as to render it accountable in punitive damages.

In cases involving vicarious liability for damages where police officers have been involved, the Federal Courts have certainly extended such liability no further than *Lake Shore*, *supra*, and some decisions are even more conservative:

"Sec. 90 – Non-Involvement of Supervisory Personnel.

"Some federal district courts have held that the doctrine of respondeat superior has no place under the civil rights

statutes, on the theory that personal involvement is contemplated. (citing Salazar v. Dowd, 1966, D.C. Colo) 256 F. Supp. 220.

"A number of district courts have held that police supervisory personnel are not liable for damages to one injured by police misconduct absent direct personal participation. One such court states:

"'Even though (the police chief) may be charged with the duty of selecting the members of the force, he is not responsible for their acts unless he has directed such acts to be done, or has personally cooperated in the offense, for each police officer, is, like himself, a public servant.' (citing Jordan v. Kelly (1963, D.C. Mo.) 223 F. Supp. 731; Pritchard v. Downie (1963, D.C. Ark.) 216 F. Supp 621, affd (CA8) 326 F.2d 323; Runnels v. Parker (1967, D.C. Cal.) 263 F. Supp. 271; Patrum v. Martin (1968, D.C. Ky.) 292 F. Supp. 370; Mack v. Lewis (1969, D.C. Ga.) 298 F. Supp. 1351; Sanberg v. Daley (1969, D.C. Ill.) 306 F. Supp. 277)"

Antieau, Federal Civil Rights Acts, Lawyers Co-operative (1971), at Page 116.

It is clear that this Court set down in the *Lake Shore* case the rule that generally a principal is not liable vicariously for the acts of an agent in punitive damages, since those are damages to punish the wrongdoer. This decision has been followed throughout the cases listed aforesaid and it is clear that a Federal rule has developed to this effect. This policy should have been followed by the Court of Appeals and the Federal rule with regard to damages applied in the present case.

II

THE DECISION HOLDING A SHERIFF WHO STANDS IN THE POSITION OF A PRINCIPAL VICARIOUSLY LIABLE IN PUNITIVE DAMAGES FOR THE ACT OF HIS AGENT-DEPUTY IS IN CONFLICT WITH THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

"*Amendment 7* - Trial by jury in civil cases. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

"*Amendment 8* - Bail-Punishment. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

"*Amendment 14* - Citizenship - Due Process of Law - Equal Protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Court in the case at bar took the jury verdict "for the plaintiff . . ." and without presenting the issue to the jury, automatically placed the punitive damages against the sheriff and his bonding company punishing the sheriff severely without due process, without a jury trial, and without a finding of fact in support of such action *either by the jury or by the Court*. There was no consideration

of the defendant sheriff's financial resources, his ability to pay, or any other factors which might be taken into account in order for the jury to intelligently award punishment damages if they felt any were proper against this particular defendant. Certainly this violates this defendant's right to trial by jury and violates the Federal rule that a Court in fixing the amount of punishment must consider the financial resources and burden on the particular defendant. See *United States v. United Mine Workers of America*, (1947) 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677.

Scott v. Donald, 17 S. Ct. 265, 165 U.S. 58, 41 L. Ed. 632, is a decision of this Court dealing with punitive damages against officers of the law. Therein is found the following language which is being quoted by the Court with approval:

> ". . . In many civil actions . . . the wrong done to the plaintiff is incapable of being measured by a money standard, and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may be termed 'exemplary' or 'vindictive' rather than 'compensatory'."

17 S. Ct. at Page 268.

In the case of *Basista v. Weir*, the Federal Rule with regard to punitive damages was clearly stated:

> "The general rule as to punitive damages, repeatedly found in the reported case, is that they may be imposed if the defendant has acted wilfully and in gross disregard for the rights of the complaining party. Roberts v. Pierce, 5 CIR 1968, 398 F.2d 954. Since such damages are punitory and are assessed as an example and warning to others, Northwestern National Casualty

Company v. McNulty, 5 CIR 1962, 307 F.2d 432, *they are not a favorite in law and are to be allowed only with caution and within narrow limits*. Aladdin Mfg. Co. v. Mantle Lamp Co. of America, 7 CIR 1941, 116 F. 2d 708. (Emphasis added.)

"The allowance of such damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the *trier of fact*. (Emphasis added.) See Crowell-Collier Publishing Co. v. Caldwell, 5 CIR 1948, 170 F.2d 941.

"It was there held that the jury should have been instructed 'that they *may*, *not that they must*, award them (punitive damages)' 170 F.2d at 945." (Emphasis added.)

It is the earnest plea of Sheriff Carroll that the vicarious assessment of punitive damages to him is without the spirit and the letter of the United States Constitution as well as the reasons and rules with regard to punitive damages.

III

THE OPINION OF THE COURT OF APPEALS HOLDING THAT A SHERIFF IS LIABLE VICARIOUSLY FOR PUNITIVE DAMAGES FOR THE ACT OF HIS DEPUTY EVEN THOUGH THE SHERIFF DID NOT PARTICIPATE IN, AUTHORIZE OR RATIFY THE ACT OF THE DEPUTY, IS IN CONFLICT WITH APPLICABLE TENNESSEE LAW.

In Tennessee under *Ivy v. Osborne*, 152 Tenn. 470, 279 S.W. 384 (1925), and *Waters v. Bates*, 227 F. Supp. 462 (1964), the sheriff in the present case would be liable

for compensatory damages since the deputy was attempting to serve process and was in furtherance of the business of his principal, the sheriff. The sheriff has not complained that the Court's action with regard to compensatory damages was in error.

It is not and has not been the rule in Tennessee, however, that a sheriff is liable for punitive damages for the act of his deputy *automatically* and without the question being submitted to the jury as to the sheriff's own individual liability under the rules of principal-agency. The latest ruling by the Tennessee Courts with regard to when a Sheriff may be held liable in punitive damages for the acts of his deputy is set out in a 1958 case. Clearly liability is founded upon the theory of agency and the Tennessee Court of Appeals states that a sheriff may be liable ". . . the same as any other principal."

> ". . . As to the issue of punitive damages, it is well settled in this state that where a principal is found to be liable for a wrongful act of his agent, 'done with a bad motive and a disregard of social obligations, "the principal *may* be held for exemplary or punitive damages as well as the agent. Springer Transportation Co. v. Smith, 84 Tenn. 498, 502, 1 S.W. 280; Knoxville Traction Co. v. Lane, 103 Tenn. 376, 389, 53 S.W. 557, 46 L.R.A. 549; American Lead Pencil Co. v. Davis, 108 Tenn. 251, 66 S.W. 1129.
>
> "The basis for holding the principal for the acts of his agent is that the agent acts as the principal's alter ego or other self. 2 Mechem on Agency (2d ed) 1802-1806. Since the deputy acts as the sheriff's other self, we think the sheriff is liable for exemplary damages *same as any other principal*. Such a rule is not a hardship on the sheriff, who can be indemnified by the

bonds of his deputy, but is a needed protection of citizens against official abuse and oppression.

"While there is authority to the contrary, we think the rule, supported by the better principle and the greater weight of authority, is that a sheriff *may* be held liable for punitive, as well as compensatory damages, for a wrongful official act of his deputy. 47 Am. Jur. Sheriffs, Police, and Constables, sec. 158, 166, and the cases cited in the annotations in 1 A.L.R. 241, 102 A.L.R. 185, 116 A.L.R. 1071." (Emphasis added.) *State ex rel Coffelt v. Hartford Accident & Indemnity Company*, 314 S.W.2d 161, at page 163. (T.A. 1958, cert. den. June 6, 1958).

The Tennessee law with regard to when a principal is liable in punitive damages for the wanton acts of his servant or agent is set out in *Earley v. Roadway Express*, 106 F. Supp. 958 (E.D. Tenn. 1952), which case is widely cited in Tennessee. This case states that generally a principal is not liable in punitive damages for the wanton acts of his servant or agent with the following exceptions, to-wit: (1) when the principal is under a contractual duty to the injured party, such as a common carrier (this would virtually be a breach of warranty action); (2) where the principal must contemplate the use of force by his servant, or (3) where a dangerous instrumentality is entrusted to a servant. Under the Tennessee law no principal is *automatically* liable for punitive damages for the act of an agent. The exceptions are *fact questions to be submitted to a jury*.

To petitioner's knowledge there is no case in any jurisdiction holding a sheriff is automatically liable for whatever punitive damages should be assessed against his deputy. If this was the rule, the sheriff would be punished,

the social intent of said punishment to be to deter like action in the future, when the sheriff never committed the act in the first place. Stated more simply, ***A MAN SHOULD NOT BE PUNISHED FOR SOMETHING HE DID NOT DO, and, under the proof in the present case, could not have prevented.*** Punitive damages under the Tennessee rules are awarded not to compensate the injured party but to punish the wrongdoer. See *Booth v. Kirk*, 53 Tenn. App. 139, 381 S.W.2d 312 (1964), and *Honaker v. Leonard*, 325 F. Supp. 212, E.D. Tenn. Northern Division (1971).

The Tennessee Court has spoken on public policy with regard to punitive damages and vicarious liability in *Price v. Clapp*, 119 Tenn. 425, 105 S.W. 864 (1907).

> Exemplary damages ". . . are allowed for a wanton and flagrant wrong. Why, then, should they be required of one absolutely blameless, and only held liable on technical grounds? So it is, we think, the weight of authority and of sound reason that the damage recoverable against him is compensatory, and that vindictive damages will not be allowed."
>
> *Price v. Clapp, supra*, at Page 434.

The general rule with regard to punitive damages is stated in 22 Am. Jur. 2d (Damages) Sec. 341:

> "Sec. 341 - Exemplary or punitive damages.
> In jurisdictions in which exemplary or punitive damages are allowable, whether such damages shall be allowed in the particular case being tried rests in the discretion of the jury under all the circumstances of that case. If there is any evidence warranting their allowance, its weight and force rest exclusively with the jury; under such circumstances, it is error to direct the jury to allow them. Thus, it is for the jury

to determine whether the defendant was actuated by malice or whether there was such a reckless disregard of the rights of others as to warrant an award of punitive damages, and to determine whether the damages should be mitigated because of provocation. And it is also for the jury to fix the amount of exemplary damages to be awarded."

It is clearly the law in Tennessee that each award of punitive damages must rest upon the particular facts with regard to the wrong itself as well as the particular facts with regard to the defendant himself. In fact the defendant's financial status is to be considered in assessing punitive damages.

See *McDonald v. Stone*, 321 S.W.2d 845, 45 Tenn. App. 172 (1959), *Klein v. Elliott*, 436 S.W.2d 867, 59 Tenn. App. (1968), *Blazenby v. Universal Underwriters Insurance Co.*, 383 S.W.2d 1, 214 Tenn. 639 (1964).

In the present case, if the Federal rule was not to be followed, then, the rules under which a principal may be liable for the acts of his agent in punitive damages, as set out in *Earley v. Roadway Express*, *supra*, should have been charged to the jury and the jury allowed to assess punishment damages against defendant sheriff within their discretion. This is the Tennessee rule as set out in *Coffelt*, *supra*.

Under the decision of the Court below, the Tennessee rule with regard to compensatory damages, is applied to the issue of punitive damages and such a rule is in absolute disregard of all reasons for the awarding of punitive damages. It is submitted that this decision is not sound public policy.

IV

THE COURT OF APPEALS' APPROVAL OF THE DISTRICT COURT'S ACTION IN SUMMARILY ASSESSING TO THE SHERIFF THE JURY'S JUDGMENT FOR PUNITIVE DAMAGES GIVEN FOR THE PLAINTIFFS (AND ERRONEOUSLY NOT AGAINST ANY DEFENDANT) IS NOT CONSISTENT WITH DUE PROCESS OF LAW AND IS IN CONFLICT WITH THE SPIRIT OF THE DECISIONS OF FEDERAL COURTS.

The District Court charged the jury as follows:

> "If you find that Officer Latham was a deputy sheriff of Blount County under Sheriff Carroll, and that while acting in the performance of his duties of the deputy sheriff deprived these plaintiffs or any of them, wrongfully of their civil rights, then the sheriff, by reason of being sheriff, what they call the high sheriff in our section of the country, would be responsible for the damages caused if any."

Then having charged the jury thusly, the District Court submitted a written verdict form for the jury to answer. (The form is set out in the record.) It is significant that the jury was not asked to make a finding against any one of the defendants. The District Court erroneously reserved this act for itself. The jury was simply requested to make a finding either in favor of the plaintiff or defendant and to fix the compensatory damages if they found for the plaintiff and if they found compensatory damages for the plaintiff then to fix the plaintiffs' punitive damages, if any.

The jury returned and made separate findings on the McDaniel case, the Harbison case and the Jenkins case.

> "THE FOREMAN: In the case of Steven Ray McDaniel, *we find for the plaintiff* and fix the compensatory dam-

ages at $500.00 and the punitive damages at $3,500.00." (Emphasis added.)

"THE FOREMAN: In the case of Constance Beverly Harbison, *we find for the plaintiff* and fix the compensatory damages at $500.00 and the punitive damages at $3,500.00." (Emphasis added.)

"THE FOREMAN: In the case of Benny Fred Jenkins, *we find for the plaintiff*, and fix his compensatory damages at $3,000.00 and the punitive damages at $30,000.00." (Emphasis added.)

The significance here is that the jury found as the Judge charged them to find; and in this case they found *for the plaintiff*. *They did not make a finding against any defendant*. After the jury was discharged, the Trial Judge entered judgment against the three defendants not allowing the jury the benefit of the *Coffelt* case, *supra*, not allowing the jury to determine whether or not the sheriff "*may* be held liable for punitive, as well as compensatory damages, for a wrongful official act of his deputy." This is significant because this was an issue that was decided by the erroneous stroke of the Judge's pen in signing such an order after the jury verdict.

The issue of punitive damages therefore was taken from the jury as to the defendant sheriff. The Federal rule is the same as the Tennessee rule, to-wit, that punitive damages are to be assessed by the jury. See *Hooper Holmes Bureau v. Bunn*, 161 F.2d 102 (5 CIR) 1947, *Monteiro v. Paco Tankers*, (1950) 93 F. Supp. 93, E.D. Penn., *General Motors Acceptance Corp. v. Froelich* (1959), *supra*. *Basista v. Weir*, *supra*, and cases collected at 19 FRD-140-208(8); "Exemplary Damages".

The petitioner sheriff was thus affirmatively denied a jury trial or finding of fact on the issue of punitive damages.

CONCLUSION

Wherefore Sheriff Carroll and his bonding company ask that a writ of certiorari issue to review the judgment of the Court below and that on such review the judgment as to these defendants for punitive damages be reversed.

Respectfully submitted,

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Of Counsel

APPENDIX A

NO. 71-1871

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[fol. 1]

STEVEN RAY McDANIEL b/n/f and natural parent of KEITH McDANIEL; BENNY FRED JENKINS and CONSTANCE BEVERLY HARBISON,
Plaintiffs-Appellees,

vs.

ROBERT CARROLL and WESTERN SURETY COMPANY,
Defendants-Appellants.

APPEAL from United States District Court for The Eastern District of Tennessee, Northern Division

Decided and Filed April 11, 1972.

Before WEICK, McCREE and MILLER, Circuit Judges.

WEICK, Circuit Judge. The actions in the District Court were brought under the Civil Rights Act[1] against the Sheriff of Blount County, Tennessee, the Deputy Sheriff, and the surety on the Sheriff's bond, to recover compensatory and punitive damages for personal injuries sustained by the plaintiffs when they were shot by the Deputy as he was endeavoring to serve an arrest warrant.

[1] Title 42 U.S.C. §§ 1983, 1985.

The cases were consolidated and tried before a jury, which returned a verdict in favor of each plaintiff against all of the defendants, for both compensatory and punitive damages. The sheriff and his surety have appealed. No appeal was filed in behalf of the deputy who did the shooting. We affirm.

[fol. 2]

On appeal, the sheriff does not question the awards to the plaintiffs of compensatory damages, but he argues that punitive damages should not have been assessed against him for the reason that he was not present when the shooting occurred and did not participate in it, and did not authorize or ratify it.

Under Tennessee law, however, a sheriff and his surety are liable for compensatory as well as punitive damages for torts committed by a deputy sheriff in the performance of his official duties. *State ex rel. Coffelt v. Hartford Acc. & Indemn. Co.*, 44 Tenn. App. 405, 314 S.W.2d 161 (1958), certiorari denied by the Supreme Court of Tennessee.

It is undisputed that at the time of the shooting the deputy sheriff was endeavoring to serve an arrest warrant, which was in the performance of his official duty. The shooting was entirely unjustified and without warrant in law. No claim is made that the verdict was not supported by substantial evidence.

Federal law permits the recovery of punitive damages in actions under the Civil Rights Acts. *Caperci v. Huntoon*, 397 F.2d 799 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968); *Mansell v. Saunders*, 372 F.2d 573 (5th Cir. 1967); *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965).

In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Court, in an opinion written by Mr. Justice Douglas, said:

"This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. *Brazier v. Cherry*, 293 F.2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." (*Id.* at 240).

[fol. 3] The sheriff contends that under federal law, damages may not be assessed against a principal for acts committed by an agent and not participated in or ratified by the principal. *Lake Shore & Mich. So. Ry. v. Prentice*, 147 U.S. 101 (1893); *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969). *Lake Shore* was decided before *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938). *United States Steel* was an admiralty case.

Furthermore, in Civil Rights cases the common law of a state may be used on the issue of damages where it better serves the policies expressed in the federal statutes. *Sullivan v. Little Hunting Park, Inc., supra.*

In *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969), the Court held that apart from his claim under § 1983, a plaintiff was entitled under the doctrine of pendent jurisdiction to consideration of his claim under the common law of Texas, citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

We find no error in the Court's instructions to the jury on punitive damages. Defendants made no objection to the instructions on that ground and are not in position to claim error here. Rule 51, Fed.R.Civ.P.

Other errors alleged have been considered, but in our judgment they do not merit discussion.

Affirmed.

APPENDIX B

[fol. 1]

NO. 71-1871

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVEN RAY McDANIEL, b/n/f and natural parent, KEITH McDANIEL, BENNY FRED JENKINS, and CONSTANCE BEVERLY HARRISON,
Plaintiffs-Appellees,

v.

ROBERT CARROLL and WESTERN SURETY COMPANY,
Defendants-Appellants.

FILED
May 30, 1972
James A. Higgins, Clerk

ORDER

Before: WEICK, McCREE and MILLER, Circuit Judges.

No Judge of this Court having requested that a vote be taken on the suggestion of appellants for an en banc hearing of their petition for rehearing, the petition was referred to the panel for determination. Upon consideration, it is ordered that the petition for rehearing be and it is hereby denied.

Entered by order of the Court.

/s/ James A. Higgins
Clerk

APPENDIX C

[fol. 1] [Caption Omitted]

ORDER

(Filed June 10, 1971)

Defendants have moved for a new trial after a jury verdict of $41,000.00 in favor of the three plaintiffs.

[fol. 2] The first and second grounds are that prejudicial error was committed in charging the jury that the defendant Latham had gone to the premises where the shooting later occurred to search the house and in refusing to correct this error upon request.

The reporter has read portions of that charge which show that the jury was advised that the officers went to the premises to arrest the person named in the warrant. The Court committed no prejudicial error.

The third alleged error is based upon the Court's failure to charge the defendant's special request on self-defense. The Court instructed the jury on the force a deputy could use in arresting a person and also charged that the deputy could use the force necessary to defend himself. The instruction was adequate.

The fourth, fifth and ninth grounds relate to punitive damages. The jury returned $30,000.00 in favor of plaintiff Jenkins, and $3,500.00 for both plaintiffs McDaniel and Harbison. In the opinion of the Court, the aggravated acts shown justified these amounts and do not show passion, prejudice or unaccountable caprice by the jury. The Sheriff and the bonding company were properly held liable for these amounts. *Gaston v. Gibson*, (No. 6566,

E.D. Tenn. November 3, 1966); *Earley v. Roadway Express*, 106 F. Supp. 958 (E.D. Tenn. 1952); *Bucher v. Krause*, 200 F.2d 576, 587 (C.A. 7, 1953).

[fol. 3] The sixth ground is that the Court erred in instructing the jury that the loaned servant doctrine was not applicable. On the facts of this case, a charge on the loaned servant doctrine was not appropriate.

The eighth ground is that the Court did not have jurisdiction to proceed against the Sheriff and the deputy's bonding company. Western Surety Company was served by the Tennessee Commissioner of Insurance and Banking under T.C.A. § 56-245. It is an Illinois business and bonded the Sheriff for $20,000.00 and the deputy for $5,000.00. All the other parties were residents of Blount County. Subject matter jurisdiction of these parties was under 42 U.S.C. § 1983. The Court is of the opinion that Western Surety's argument actually deals with joinder rather than jurisdiction. Joinder was proper under F.R.C.P. 19, "Joinder of persons needed for just adjudication."

The seventh ground is that the Court erred in rendering a general verdict against Western Surety when its liability could not exceed the amount of the bond. The judgments in the three cases do appear to hold Western Surety responsible for the entire $41,000.00. However, defendants assert in their brief that Western Surety is only liable for $20,000.00, or at most $25,000.00. The attorneys for the parties will correct any possible error in the judgment against Western Surety in the order of disbursement. It appears without examination [fol. 4] of the bonds that Western Surety is only liable for $20,000.00. The Court assumes the dis-

bursement will be prorated among the plaintiffs. There is no reason to grant a new trial on this point.

It is, therefore, ORDERED that each and every ground of the new trial motion be, and same hereby is, denied.

Enter:

/s/ ROBT. L. TAYLOR
United States District Judge

APPENDIX D

28 U.S.C. 1254(1)

Case in Court of Appeals may be reviewed by the SUPREME COURT by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgment or decree;

* * *

APPENDIX E

42 UNITED STATES CODE

1983. Civil Action for deprivation of rights.—
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R. S. § 1979.)

* * *

1985. Conspiracy to interfere with civil rights. —
First. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of

his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having

and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R. S. § 1980.)

• • •

1988. Proceedings in vindication of civil rights. — The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R. S. § 722.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-338

ROBERT CARROLL and WESTERN SURETY COMPANY,

Petitioners,

v.

STEVEN RAY McDANIEL, b/n/f and natural parent, KEITH McDANIEL; BENNY FRED JENKINS, and CONSTANCE BEVERLY HARBISON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 457 F.2d 968 (Appendix A of Petition). The unwritten opinion of the District Court is Appendix C of the Petition. The order denying the petition for rehearing is Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the Six Circuit Court of Appeals' decision holding a Sheriff, who stands in the position of a principal, vicariously liable for *punitive* damages of his agent-deputy, is in conflict with applicable decision of this Court and other U. S. Courts of Appeals?

2. Whether the Sixth Circuit Court of Appeals' decision holding a Sheriff, who stands in the position of a principal, vicariously liable for punitive damages of his agent-deputy, is in conflict with Amendment 7, 8, and 14 of the United States Constitution?

3. Whether the holding of the Court below that a Sheriff is liable vicariously for punitive damages for the act of his deputy, even though he did not participate in, authorize or ratify said act, is in conflict with applicable Tennessee law?

4. Whether the Sixth Circuit Court's approval of the District Court's action in entering a verdict assessing to the Sheriff the jury's judgment for punitive damages given against the deputy is in conflict with the verdict of the jury, is consistent with due process of law and is in conflict with decisions of this Court and other Federal Courts?

STATUTES AND RULES INVOLVED

The pertinent statutory provisions involved are 42 U.S. Code 1983, 1985, 1988, and are set forth in the petition as Appendix E at pp. 31-33.

STATEMENT OF THE CASE

The petition adequately sets forth the statement of the case with the exception of the petitioners' statement that overall supervision of proceedings was in the hands of Alcoa city officials. The facts show that the authority to serve a state warrant was vested in the deputy sheriff upon his arrival at the scene of the incident and that a city police officer had no jurisdiction or authority to serve a state warrant.

ARGUMENT

I. INTRODUCTION

The central theme of the petitioners' contention is that the sheriff and/or the surety on his official bond is not liable for the acts done by the deputy. It further appears that the doctrine of vicarious liability, according to the petitioners' theory, extends only to those damages which are actually compensatory and not those of the punitive nature. Taking petitioners' theory to its ultimate, it would then be concluded that all authority is vested in the sovereign, which is immune from suit and judgment. This logic is not followed by today's courts.

In the absence of legislation, specific in nature, granting immunity for specific acts, the courts hold that "when a tort is made possible only through the abuse of power granted by the government, then the government should be held accountable for the abuse whether it is negligent or intentional in character." *Carter v. Carlson*, 447 F.2d 358, 366 (C.A. D.C. 1971) (Cert. granted 404 U.S. 1014, appeal pending).

This Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396;

91 S. Ct. 1999, 2004; 27 L. Ed. 2d 619, 626 (1971), citing *Bell v. Hood*, 327 U.S. at 684; 66 S. Ct. at 777; 9 L. Ed. 939 (1946) held that it is equally well settled "that where legal rights have been invaded, and a Federal statute provides for a general right to sue for such invasion, Federal courts may use any available remedy to make good the wrong done."

Petitioners' contentions appear to be based upon the rules laid down in *Monroe v. Pape*, 365 U.S. 187, 81 S. Ct. 173, 5 L. Ed. 492 (1961). The *Monroe v. Pape* case is only cited for its holding that Section 1983 does not authorize a suit for damages against a municipality which has been clothed in immunity by the parent state.

The petitioners' contentions further appear to attempt to impose the doctrine of principal and agent upon his relationship between the sheriff and his deputy, in essence the petitioners attempt to separate the sheriff from his alter ego or his shadow from himself.

Petitioners contend that there is conflict among applicable decisions of other United States Courts of Appeals. Respondents contend that the petitioners did not state the applicable law. "Deprivation of civil rights is not aimed at common law negligence, but of deprivation of rights secured by the Fourteenth Amendment." *Roberts v. Williams*, 456 F.2d 819, 825 (5th Cir. 1971). (Cert. denied, 404 U.S. 866, 92 S. Ct. 83, 30 L. Ed. 2d 110, 1971). Thus an act may be both a violation of state and federal common law and the remedies co-extensive, provided that local variations allowing diminution of amount of recovery are not imposed as provided in Federal common law. *Capercí v. Huntoon*, 379 F.2d 799 (1st Cir. 1968) (Cert. denied 393 U.S. 940, 1968).

Federal common law as applied by various Circuits is the same as Tennessee common law on the subject.

II. DECISION OF THE COURT OF APPEALS HOLDING THE SHERIFF VICARIOUSLY LIABLE FOR THE ACTS OF HIS DEPUTY IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER U. S. COURTS OF APPEALS.

VICARIOUS LIABILITY UNDER FEDERAL DECISIONS

Carter v. Carlson, *supra*, page 369, states that the

"construction of Section 1983 finds additional support in a related statute, 42 U.S.C. Section 1988, also enacted by a Reconstruction Congress as part of the original Civil Rights legislation. Section 1988 provides:

"'(1) In all cases where (the laws of the United States) are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies ... the common law ... of the State wherein the Court having jurisdiction ... is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause ....'

"The Supreme Court has construed Section 1988 to incorporate into the federal civil rights laws state rules of liability insofar as they serve the policies of the federal statutes more effectively than federal rules of liability. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 240, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969). If local law recognizes government liability where federal common law might not, then Section 1988 seems to

provide that the local rule shall govern in an action under Section 1983."

The Courts in *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971), and *Roberts v. Williams*, *supra*, held that the sheriff is liable for the acts of his deputy even though the sheriff individually is ignorant of such actions. In *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969), the Court held the sheriff and his sureties responsible for the acts of the deputy even though they were ignorant of the wrongful acts of the deputy and even though under Texas law, the sheriff was liable only if he ratified the acts of the deputy.

In *Rhoads v. Horvat*, 270 F. Supp. 307 (C.D. Colo. 1967), Eighth Circuit, held sheriff and deputy liable for both compensatory and punitive damages for violation of civil rights by false arrest.

III. DECISION OF THE COURT OF APPEALS HOLDING THE SHERIFF VICARIOUSLY LIABLE FOR THE ACTS OF HIS DEPUTY IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF TENNESSEE LAW.

VICARIOUS LIABILITY UNDER TENNESSEE DECISIONS

The District Court, in holding the sheriff and the bonding company liable for both compensatory and punitive damages, relied upon the Tennessee law which clearly holds such is proper. *Jones v. State*, 194 Tenn. 534, 252 S.W.2d 740 (1952); *State Ex. Rel. Harbin v. Dunn*, 39 Tenn. App. 109, 282 S.W.2d 203 (1943); *State Ex. Rel. Coffelt v. Hartford Accident and Indemnity Company*, 44 Tenn. App. 405, 314 S.W.2d 161 (1958); *Lazenby v. Universal Underwriters Insurance Company*, 214 Tenn. 639, 383 S.W.2d 1 (1964); and *Tennessee Code Annotated*,

Section 8-1920(3). This is the same as Federal common law. This holding is not in conflict with other Circuits. *Hesselgesser v. Reilly*, (9th Cir.) *supra*; *Roberts v. Williams*, (5th Cir.) *supra*; *Whirl v. Kern*, (5th Cir.) *supra*.

IV. THE DECISION OF THE COURT OF APPEALS HOLDING THE SHERIFF VICARIOUSLY LIABLE FOR BOTH COMPENSATORY AND PUNITIVE DAMAGES IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER U. S. COURTS OF APPEALS.

VICARIOUS LIABILITY OF THE SHERIFF IMPOSING COMPENSATORY AND PUNITIVE DAMAGES UPON THE SURETY, UNDER FEDERAL LAW

"The view which we take of sheriff ... statutory responsibilities makes it necessary to hold that the ...., surety on the sheriff's bond, is also liable for the damages sustained by appellant Whirl. The general rule in Texas is ' ... in order to recover of the surety upon the official bond of the sheriff or constable for a trespass committed by him, it will be shown that the act was done in the performance of a duty legally imposed upon him by virtue of his office.'" *Whirl v. Kern*, *supra*, p. 796.

In *Hesselgesser v. Reilly*, *supra*, the Court allowed a recovery against the sheriff and the bonding company upon the premises that such a position of vicarious liability of the surety was not inconsistent with the Constitution and laws of the United States or under the laws of the State of Washington. Punitive damages are clearly authorized under Section 1983. *Caperci v. Huntoon*, *supra*; *Mansell v. Saunders*, 373 F.2d 573 (5th Cir. 1967); *Basista v. Weir*, 340 F.2d 74 (3rd Cir. 1965); *Hesselgesser v. Reilly*, *supra*; *Roberts v. Williams*, *supra*; *Whirl v.*

Kern, supra; *Jones v. Rundle*, 453 F.2d 147 (3rd Cir. 1971); *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971); *Guido v. City of Schenectady*, 404 F.2d 728 (2nd Cir. 1968).

V. THE DECISION OF THE COURT OF APPEALS HOLDING THE SHERIFF VICARIOUSLY LIABLE FOR BOTH COMPENSATORY AND PUNITIVE DAMAGES IS NOT IN CONFLICT WITH APPLICABLE TENNESSEE LAW.

VICARIOUS LIABILITY OF THE SHERIFF IMPOSING COMPENSATORY AND PUNITIVE DAMAGES UPON THE SURETY, UNDER TENNESSEE LAW

The Tennessee cases clearly hold that sureties of the sheriff are liable for both compensatory and punitive damages for acts done by the sheriff's deputy. *State Ex. Rel. Coffelt v. Hartford Accident and Indemnity Company*, *supra*, and *State Ex. Rel. Davis v. Hartman*, 306 F. Supp. 610 (E.D. Tenn. 1969). Tennessee law clearly authorizes that the deputy acts in lieu of the sheriff and in his name, representing the sheriff officially, and not as an agent, *Ivy v. Osborn*, 152 Tenn. 470, 279 S.W. 384 (1925) and that the surety of the sheriff is liable for compensatory as well as punitive damages for the acts of the deputy. *State Ex. Rel. Coffelt v. Hartford Accident and Indemnity Company*, *supra*, *State Ex. Rel. Davis v. Hartman*, *supra*, and *Gaston v. Gibson*, 328 F. Supp. 3 (E.D. Tenn. 1969).

VI. THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY APPLIED RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE, WHICH CANNOT NOW BE RAISED IN QUESTION FOR THE FIRST TIME.

THE COURT'S INSTRUCTIONS TO THE JURY ON COMPENSATORY AND PUNITIVE DAMAGES

Rule 51 of the Federal Rules of Civil Rules of Civil Procedure states that no error as to a District Court's instruction to the jury can be assigned on appeal unless specific objection is raised prior to the jury's retiring. In this cause the District Court asked attorneys for both parties for objection to the charge and none were made. At least one Circuit Court of Appeals, the Ninth, requires strict application of this rule. *Brock v. United States*, 375 F.2d 479 (1969); *Crespo v. Fireman's Fund Indem. Co.*, 318 F.2d 174 (1963).

The Sixth Circuit has, however, been more liberal and has adopted an exception to Rule 51 for what is termed "plain error." *O'Brien v. Willis Motors, Inc.*, 385 F.2d 163 (1967) defines the test to be applied in determining whether or not to grant the exception. For the exception to apply the error must be both obvious and prejudicial. The test is taken from the United States Supreme Court as follows:

"In *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555, the Court said:

> 'In *exceptional* circumstances, especially in criminal cases, appellate courts, in the public interest may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise *seriously* affect the fairness, integrity or public reputation of judicial proceedings.' 385 F.2d 163 at 166. (Emphasis added.)

Petitioners, not having raised question at trial, cannot now claim error.

On the facts which are not disputed and the apparent unanimity of the Circuits as to the prevailing law, the decision of the District Court and the Court below was manifestly correct. There appears to be no conflict of decision and no importation question of Federal law requiring decision of this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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